BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBRA D. SCHROEDER Claimant VS. **KAN-PAK, LLC** Respondent AND **COMMERCE & INDUSTRY INSURANCE COMPANY** Insurance Carrier	)	Docket No. 1,067,972

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the January 24, 2014, preliminary hearing Order entered by Administrative Law Judge Gary K. Jones. William A. Wells of Wichita, Kansas, appeared for claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found claimant entitled to medical care and designated Dr. Pat Do as the authorized treating physician. The ALJ determined claimant did not willfully fail to use a reasonable and proper guard and protection and/or recklessly violate respondent's workplace safety rule as stated in K.S.A. 2013 Supp. 44-501(a), but rather claimant's November 25, 2013, fall was primarily caused by a spill on the floor and would not have been prevented by claimant's use of the work boots or shoe covers assigned by respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 21, 2014, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues the ALJ's Order should be reversed and compensation disallowed. Respondent contends claimant's injury is not compensable because her "refusal to wear the work boots and shoe covers, and her insistence upon wearing tennis shoes in violation of the company policy, demonstrate a willful failure to use a reasonable guard and protection provided by the employer," pursuant to K.S.A. 2013 Supp. 44-501(a)(1).[1] Morever, respondent argues claimant recklessly violated its workplace safety rules when she deliberately acted in disregard of and with indifference to the risk of working on wet and slick floors, a risk of which claimant admitted she was aware.

Claimant maintains respondent's arguments are inapplicable to the factual circumstances of her accident and injuries. Claimant argues she was "wearing athletic shoes with a 'leather upper' and with a 'good non-slip sole' as required by company policy"[2] on the date of her accident, and respondent was aware claimant had worn the shoes for 19 days prior to her accident. Further, claimant states she was not required to wear shoe covers while inside the buildings, where she was located at the time of the accident. Claimant contends the cause of the accident was the existence of coconut oil on the floor and not the failure to wear boots; therefore, "it was the violation of a company safety rule by another employee that caused the accident, i.e., the failure to immediately report and clean up any leakage."[3]

The issue for the Board's review is: Was claimant's accident the result of willful failure to use a reasonable and proper guard or protection voluntarily furnished by respondent or the result of a reckless violation of respondent's workplace safety rules or regulations?

FINDINGS OF FACT

Claimant began employment with respondent on November 4, 2013. Claimant worked in the sanitation department, a position involving various cleaning duties. Respondent issued uniforms and work boots to its employees, and required its uniforms and boots to "be clean and worn during all working hours."[4] Shoe covers were required to

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[1] Respondent's Brief (filed Feb. 10, 2013) at 6.

[2] Claimant's Brief (filed Feb. 20, 2013) at 3.

[3] *Id*.

[4] P.H. Trans., Cl. Ex. 1 at 1.

be worn when an employee traveled off of the concrete pad between buildings.[5] Respondent's employees each received an employee handbook which provided, in part:

> Please remember, never operate any equipment or perform any job function until you have been trained to do so safely.
>
> . . . .
>
> Wear shoes with good non-slip soles and leather uppers. Canvas shoes, tennis shoes, sandals, open-toed shoes, etc. are not allowed in production areas.
>
> Clean up spillage and breakage immediately.[6]

Claimant signed documentation acknowledging her receipt of respondent's employee handbook on November 5, 2013.

On November 25, 2013, claimant was indoors cleaning a footbath when she slipped in coconut oil and fell to the ground. The oil had dripped from a nearby machine and coated the floor. Claimant stated she was unaware of the spill and could not see it on the floor. Claimant was not the employee responsible for cleaning spillage. She fractured her right wrist as a result of the fall and also injured her lower left leg and right shoulder.

Claimant was not wearing the boots provided by respondent at the time of her fall. Claimant testified she had not received said boots until two days prior to her accident and instead wore her personal athletic shoes while on duty. Claimant testified the boots had caused a blister on her toe the day before the accident and she "could not walk with them."[7] Claimant chose not to wear the boots on the day of the accident. Claimant showed the blister to Jennifer Moore, respondent's human resources director. Ms. Moore observed a spot on claimant's toe. Ms. Moore testified the spot was located on the bottom of claimant's fourth toe and not very big.

Ms. Moore also stated employees are asked to wear shoe covers if they do not have boots, though respondent's policy indicates shoe covers must be worn when traveling off of the concrete pad between the buildings. Claimant was indoors at the time of her accident. Claimant testified she did not wear the shoe covers because they were "huge," and "they would get wet and they would just be slippery, and there wasn't any point."[8]

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[5] *Id*. at 77

[6] *Id*. at 2-3.

[7] P.H. Trans. at 25.

[8] *Id*. at 28 & 29.

James McNinch, claimant's supervisor, testified he knew claimant did not wear the company-issued boots for the initial 19 days of her employment. He did not instruct claimant to provide herself with a pair of boots, and he did not tell claimant she could not go onto the work floor without boots. Mr. McNinch did not know claimant had received the company issued-boots prior to the accident. He stated it sometimes takes up to two weeks or longer to get the boots for new hires.[9] He recalled having a conversation with claimant the day of her accident, but did not recall any mention of whether she would wear her boots that day. Mr. McNinch stated, "If I had known she had [the boots provided by respondent], sir, I would have insisted she wear them or go upstairs and get another pair that properly fit her."[10]

Claimant testified she received basically no training for her position because on her second day of employment, the woman responsible for training her was fired. Claimant stated she did not feel she knew how to do her job, and upon informing Mr. McNinch of the same was told "to do the best [she] could do."[11] However, claimant agreed on cross examination she knew how to perform the part of her job she was doing directly prior to the fall, even without training.

Following her fall, claimant was transported by ambulance to South Central Kansas Regional Medical Center in Arkansas City, Kansas. X-rays revealed a fracture of the right distal radius, and claimant consequently received a plaster cast. Claimant testified she was not provided effective treatment at the hospital and eventually presented at the Galichia Medical Group Emergency Room in Wichita, Kansas, where an attempt was made to reset her hand and wrist. Claimant testified she was again not provided effective treatment at the emergency room.

Dr. Pat D. Do, a physician at Mid-America Orthopedics in Wichita, Kansas, initially examined claimant on November 26, 2013. Claimant presented with a history of injuring her right wrist after a fall at work and subsequent treatment of a splint and sling. Dr. Do reviewed claimant's radiology report and performed a physical examination, determining claimant sustained a comminuted angulated intra-articular distal radius fracture. Claimant underwent surgery on her right wrist with Dr. Do on December 2, 2013.

Postoperative medical notes dated December 9, 2013, indicate claimant reported right shoulder and right lower leg pain, and "when she fell she injured her entire body."[12] According to the notes, only claimant's wrist was authorized for treatment at that time.

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[9] *Id*. at 84.

[10] *Id*. at 87.

[11] *Id*. at 31.

[12] *Id*., Cl. Ex. 3 at 3.

Claimant testified she never received treatment for the injuries to her right shoulder and right lower extremity, although she complained of pain in those areas to medical staff directly following the accident. Emergency room records from Galichia indicate claimant complained of back pain and sustained a contusion to the left lower extremity, neither of which was addressed. There is no mention of claimant's right shoulder pain. Dr. Do's medical report from November 26, 2013, mentions only the right wrist complaint.

Dr. Do imposed restrictions of "occasional lifting and carrying no greater than ten pounds, [and] occasionally pushing or pulling no more than twenty-five pounds."[13] Respondent was unable to accommodate claimant's restrictions.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b states in part:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-501(a) states in part:

> (a)(1) Compensation for an injury shall be disallowed if such injury to the employee results from:
> (A) The employee's deliberate intention to cause such injury;
> (B) the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;
> (C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;
> (D) the employee's reckless violation of their employer's workplace safety rules or regulations; or
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> . . . .

[13] P.H. Trans. at 65-66.

> (2) Subparagraphs (B) and (C) of paragraph (1) of subsection (a) shall not apply when it was reasonable under the totality of the circumstances to not use such equipment, or if the employer approved the work engaged in at the time of an accident or injury to be performed without such equipment.

K.AR. 51-20-1 states:

> The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[14] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[15]

ANALYSIS

There is no dispute respondent provided work boots to employees for safety purposes. Jennifer Moore testified to this fact. Claimant acknowledged she was aware of the policy requiring her to wear the company-issued work boots and not to wear tennis shoes.[16] There is no evidence in the record to support an argument that the requirement for employees to wear company-issued boots is unreasonable.

The more important question is if claimant's refusal to wear the company-issued boots was willful. The Kansas Court of Appeals has defined "willful" in the context of K.S.A. 44-315(b) by stating, "'A willful act is one indicating a design, purpose, or intent on the part of a person to do wrong . . . .'"[17]

The Kansas Court of Appeals, in *Carter*,[18] stated a violation of instructions alone is not enough to render an employee's actions "willful" as a matter of law. The Court held:

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[14] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[15] K.S.A. 2013 Supp. 44-555c(j).

[16] P.H. Trans. at 58.

[17] *Beckman v. Kansas Dept. of Human Resources*, 30 Kan. App. 2d 606, 612, 43 P.3d 891 (2002); citing *Holder v. Kansas Steel Built, Inc.*, 224 Kan. 406, 411, 582 P.2d 244 (1978).

[18] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, Syl ¶5, 85, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

> For a violation of instructions to be "willful" under K.S.A. 44-501(d), it must include "the element of intractableness, the headstrong disposition to act by the rule of contradiction." *Bersch v. Morris & Co.,* 106 Kan. 800, 804, 189 Pac. 934 (1920).[19]

The burden of a "reckless violation" appears less strict than that imposed by the "willful failure" burden. In *Wiehe,*[20] the Kansas Supreme Court quoted Restatement (Second) of Torts § 500 (a) (1965), pp. 587-588:

> "**Types of reckless conduct.** Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.
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> "For either type of reckless conduct, the actor must know, or have reason to know, the facts which create the risk. . . .
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> "For either type of conduct, to be reckless it must be unreasonable; but to be reckless, it must be something more than negligent. It must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent. It must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence."

K.S.A. 2013 Supp. 21-5202(j) states:

> A person acts "recklessly" or is "reckless," when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

Claimant testified the first full day she wore the boots she rubbed a blister on her toe. She tried to wear the boots for a second day and could not because she "could not walk in them, with my foot like that, there was no way."[21] Jennifer Moore testified she observed a spot on claimant's fourth toe, but, in her lay opinion, it did not look like a blister.

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[19] *Id*., Syl ¶6.

[20] *Wiehe v. Kukal*, 225 Kan. 478, 483-84, 592 P.2d 860 (1979).

[21] P.H. Trans. at 25.

Ms. Moore's testimony that she saw a spot on claimant's toe is consistent with claimant's testimony that she developed a blister on her toe from wearing the company-issued work boots.

Respondent also argues claimant violated company policy by not wearing shoe covers. Mr. McNinch testified claimant did not have the company-issued boots her first 19 days with respondent.[22] He stated he was aware claimant was wearing tennis shoes her first 19 days working for respondent. He also testified there is nothing in the company policy requiring shoe covers inside the plant.[23] The weight of the evidence is there was no written policy requiring claimant to wear shoe covers inside the plant nor was claimant instructed to wear shoe covers when she could not wear the company-issued work boots.

The ALJ apparently found claimant to be credible. The Board generally gives some deference to an ALJ's determination regarding the credibility of witnesses, particularly when the ALJ witnessed the testimony in person.[24]

This Board Member does not find claimant's failure to wear the company-issued boots or shoe covers to be unjustified, unreasonable, a headstrong disposition to act by the rule of contradiction, or an act indicating a design, purpose, or intent on the part of a person to do wrong. She did not wear the boots because her toe hurt. She did not wear the shoe covers because she was not instructed to do so. Claimant was allowed to work for 19 days without the company-issued boots or shoe covers and was not instructed to wear shoe covers inside the plant on the day of her injury.

CONCLUSION

Claimant's accident was neither the result of willful failure to use a reasonable and proper guard or protection voluntarily furnished by respondent nor the result of a reckless violation of respondent's workplace safety rules or regulations.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Gary K. Jones dated January 24, 2014, is affirmed.

IT IS SO ORDERED.

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[22] *Id.* at 84.

[23] *Id.* at 83.

[24] See e.g., *Le v. Exacta Aerospace, Inc.*, No. 1,060,178, 2012 WL 6101126 (Kan. WCAB Nov. 27, 2012); *Wood v. Medicalodges, Inc.*, No. 1,051,863, 2011 WL 1747859 (Kan. WCAB Apr. 7, 2011); *Holman v. Epixtar Corp/Nol Group, Inc.*, No. 1,039,925, 2008 WL 4763721 (Kan. WCAB Sept. 30, 2008).

Dated this _____ day of March 2014.

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HONORABLE SETH G. VALERIUS
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Gary K. Jones, Administrative Law Judge